Chang et al v. Virgin Mobile USA LLC et al Doc. 11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF A. C., A MINOR, AND JUSTIN HO-WEE WONG,	§	
PLAINTIFFS,	§	
VS.	§	**No. 3:07-CV-01767**
VIRGIN MOBILE USA, LLC, VIRGIN MOBILE PTY, LTD., AND CREATIVE COMMONS CORPORATION,	§	
DEFENDANTS.	§	

CREATIVE COMMONS CORPORATION'S AMENDED MOTION FOR RULE 11 SANCTIONS AND MEMORANDUM IN SUPPORT

MOTION FOR RULE 11 SANCTIONS

Pursuant to *Fed. R. Civ. P.* 11(c)(1)(A), Creative Commons Corporation ("Creative Commons"), files the following *Amended Motion for Rule 11 Sanctions and Memorandum in Support.* The motion is being made because plaintiffs' counsel have (1) included Creative Commons as a defendant in this lawsuit (a) despite the clear absence of personal jurisdiction and (b) based on a claim which, as a matter of law, was not warranted by a good faith basis in law or fact; and (2) persisted in pursuing the claim, refusing to voluntarily dismiss Creative Commons, despite having been afforded the opportunity to take advantage of Rule 11's "safe harbor." The motion is based on the following grounds:

1. For the reasons articulated in Creative Commons' separately file *Amended [sic] Motion to Dismiss*:

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a. there is no personal jurisdiction over Creative Commons in Texas; or

b. no good faith basis existed in law or fact for Count V of plaintiffs' pleading.

2. For the reasons articulated in Creative Commons' separately file *Amended [sic] Motion to Dismiss*, no good faith basis exists for persisting in:

a. asserting personal jurisdiction over Creative Commons in Texas; or

b. prosecution of Count V of plaintiffs' pleading.

MEMORANDUM IN SUPPORT OF THE MOTION FOR SANCTIONS

NO BASIS EXISTED FOR NAMING CREATIVE COMMONS IN THIS LAWSUIT, AND ANY REASONABLE INVESTIGATION BY PLAINTIFFS' COUNSEL WOULD HAVE DISCLOSED THE ABSENCE OF A BASIS FOR SUIT. WORSE, HOWEVER, IS THE CONTINUING RECALCITRANCE OF PLAINTIFF, WONG, AND HIS COUNSEL TO DISMISS CREATIVE COMMONS FROM THIS LAWSUIT.

A. RULE 11 STANDARDS:

Rule 11 (b), *Fed. R. Civ. P.*, states in relevant part (emphasis added):

> By presenting to the court (***whether by signing, filing, submitting, or later advocating***) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, ***formed after an inquiry*** reasonable under the circumstances—
>
> (1) ***it is not being presented for any improper purpose, such as to*** harass or to cause unnecessary delay or ***needless increase in the cost of litigation***;
>
> (2) ***the claims . . . and other legal contentions therein are warranted by existing law*** or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) ***the allegations and other factual contentions have evidentiary support*** . . . .

Three pre-filing duties are imposed on a party or its counsel by the certification made when signing, filing, or submitting a pleading, motion, or other paper: (1) a *reasonable inquiry into the facts* which support the document; (2) a *reasonable inquiry into the law* such that the document embodies existing legal principles or a good faith argument for extension, modification, or reversal of existing law; and (3) refusal to interpose a motion for the purpose of delay, harassment, or increasing costs of litigation. *See, e.g., Thomas v. Capital Sec. Services, Inc.*, 836 F.2nd 866, 870 (5th Cir. 1988).

B. SANCTIONS ARE APPROPRIATE:

Two separate violations of Rule 11 have occurred.

The first was naming Creative Commons as a defendant in the suit, *ab initio,* when:

a. no basis existed for asserting personal jurisdiction over Creative Commons;

b. plaintiffs' counsel, *necessarily,* had to know no basis existed for Wong's negligence claim. Specifically, plaintiffs' pleading included as an exhibit and incorporated by reference the specimen license. Accordingly, plaintiffs' counsel *had* to know at the time suit was filed: (1) no contractual relationship existed between Wong and Creative Commons; (2) the license expressly disclaims all duties, warranties and liabilities; (3) the license is expressly made available "as-is;" and (4) any reasonable investigation of the law would have revealed no basis for contending Creative Commons owed Wong any legal duty.

c. Indeed, during a telephone conference between plaintiffs' counsel and Creative Commons' counsel on November 6, 2007, *Mr. Zehl expressly **admitted** he could not cite a single Texas case to support the existence of any duty owed by Creative Commons to Mr. Wong under the circumstances of this case.*

Second, plaintiffs' counsel have persisted in prosecuting Wong's baseless claim against Creative Commons despite having been provided with Creative Commons' *Amended [sic] Motion to Dismiss*, this motion for sanctions, and failing to dismiss Creative Commons as a party within twenty-one (21) days.

CONCLUSION AND REQUESTED RELIEF

For all of the foregoing reasons, defendant respectfully requests recovery of all attorney fees and expenses incurred in (a) filing the motion for sanctions, and (b) otherwise responding to plaintiffs' lawsuit.

Respectfully Submitted,

s/Derrick G. Parker

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF CONFERENCE

I certify one true and correct copy of the foregoing instrument was served on plaintiffs' lead counsel of record, by fax and first-class mail, postage pre-paid, on the 6th day of November, 2007. The Rule 12(b) motion on which the foregoing motion is predicated was served on plaintiffs' counsel on October 29, 2007. Nevertheless, plaintiffs' counsel have failed to take advantage of Rule 11's "safe harbor" and dismiss Creative Commons as a party to this lawsuit.

s/Derrick G. Parker
DERRICK G. PARKER

CERTIFICATE OF SERVICE

I certify that one true and correct copy of the foregoing instrument was served on the following lead counsel of record by fax and by first class mail, postage prepaid, on the 6th day of November, 2007:

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More than twenty-one days having expired since the date of that service.

s/Derrick G. Parker
DERRICK G. PARKER